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The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?

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THE PHENOMENON OF IMPLIED PRIVATE ACTIONS UNDER FEDERAL STATUTES: JUDICIAL INSIGHT, LEGISLATIVE OVERSIGHT OR LEGISLATION BY THE JUDICIARY?

I. INTRODUCTION

Due to the unprecedented scope and volume of federal legislation, an increasingly prominent place in the complex system of legal rights and liabilities has been accorded to federal statutes. In many cases, Congress designs a comprehensive system of public or public and private remedies to insure compliance with the statutory program. In other cases, however, laws which may have been passed to protect essentially private rights are drafted without any provision for enforcement by or recovery to those members of the public most affected by violations. Whether such omissions are deliberate exclusions or unintentional omissions, in recent years courts have construed such statutes so as to find implied in their terms private rights of civil action. This Note will examine the various bases on which courts have rested decisions to impose on violators such civil liability in the absence of express legislative authorization. In addition, it will focus on a recent decision by the Court of Appeals for the Third Circuit which found an implied private action for damages under the penal provisions of the federal election contributions laws.

II. JUDICIAL TESTS FOR FINDING IMPLIED PRIVATE ACTIONS

The courts have developed at least four tests to determine whether to find an implied private cause of action as an adjunct to the statutorily designated remedy. The tests, in order of importance, are (1) whether the legislative history of the statute and the remedial provisions in the statute taken alone and in relation to other sections and other acts demonstrate a clear expression of legislative intent respecting private action; (2) whether a private action would further the purposes of the statute; (3) whether the statutory remedies have been adequately enforced; and (4) whether the plaintiff is adequately protected by a state cause of action. Examination of the legislative history of the particular statute under analysis is the common factor in applying the first two tests.[1]

Under the "clear legislative intent" test, the court seeks to find any expressions of congressional attitude favoring or disfavoring private causes of action.[2] Different courts have followed contradictory approaches to the test.

1. National Ass'n for Community Dev. v. Hodgson, 356 F. Supp. 1399, 1403 (D.D.C. 1973).

2. Calhoon v. Harvey, 379 U.S. 134, 140-41 (1964) (the remedy provided by the statute held to have been intended as exclusive means of enforcing labor elections law); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 380-82 (1958) (same for antitrust statute); Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 306 (1943) (same for Railway Labor Act); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 40 (1916) (statutory language showed that private actions were intended); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999-1000 (D.C. Cir. 1973) (private causes of action not intended by Congress under Federal Trade Commission Act).

In *Chavez v. Freshpict Foods, Inc.*,[3] the Tenth Circuit stated the test as follows:

> This court will not fashion civil remedies from federal regulatory statutes except where . . . the intent of Congress to create private rights can be found in the statute or in its legislative history. Had the Congress intended to create private causes of action and private remedies, it was fully capable of directly and clearly so providing.[4]

In contrast, in *Burke v. Compania Mexicana de Aviacion*[5] the Ninth Circuit posed the test in the following terms:

> In the absence of a clear congressional intent to the contrary, the courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose.[6]

This latter orientation clearly assumes a judicial power to create remedies *unless restricted* by affirmative act of Congress. The *Chavez* approach, on the other hand, requires an affirmative congressional act before courts may grant remedies unexpressed in the statute. This dichotomy clearly underlines the differing views regarding the constitutional question of separation of powers implicated by "judicial legislation."[7]

Examples of the use of legislative materials to determine congressional attitude toward an implied private enforcement action are found in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*[8] and *Jordan v. Montgomery Ward & Co.*[9] In *Amtrak* the Supreme Court denied an implied private cause of action under the Rail Passenger Service Act in part because it found that Congress had considered and rejected a draft bill which would have permitted a private remedy.[10] In *Jordan,* the Eighth Circuit disallowed a private damages action partly on the basis of language in a congressional committee report to the effect that failure to provide for private civil actions under the credit advertising section of the Federal Truth in Lending Act was a deliberate omission.[11] Courts have a wide variety of other sources available for discerning congressional intent,

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3. 456 F.2d 890 (10th Cir.), cert. denied, 409 U.S. 1042 (1972).

4. Id. at 894-95; cf. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) ("inference of such a private cause of action . . . must be consistent with the evident legislative intent . . . .") [hereinafter cited as Amtrak]; Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973); Comment, Civil Responsibility for Corporate Political Expenditures, 20 U.C.L.A.L. Rev. 1327, 1342-43 (1973) [hereinafter cited as Civil Responsibility].

5. 433 F.2d 1031 (9th Cir. 1970).

6. Id. at 1033; see Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967); Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947).

7. See note 110 infra and accompanying text.

8. 414 U.S. 453 (1974).

9. 442 F.2d 78 (8th Cir.), cert. denied, 404 U.S. 870 (1971).

10. 414 U.S. at 456-61, construing Rail Passenger Service Act of 1970 § 307(a), 45 U.S.C. § 547(a) (1970).

11. 442 F.2d at 81, construing 15 U.S.C. §§ 1661-65 (1970).

including committee hearings, debates and votes on proposed amendments to the bill at issue.[12]

Seldom does the relevant legislative history contain such clear expressions of congressional intent that the court may dispose of claims simply by quoting the appropriate document; more frequently, evidence is ambiguous or scarce.[13] In these situations, some courts have deemed manifestations which seem to favor private civil action persuasive in finding implied remedies.[14] Relatively forthright evidence of congressional disapproval, however, has been held insufficient, without further justifications, to cause other courts to refuse to find implied causes of action claimed to exist.[15] When the legislative history is devoid of any treatment of the subject, courts have diverged along the lines of the *Chavez-Burke* split. One line of cases finds silence equivalent to a legislative prohibition which courts ought not disturb.[16] The other line construes silence to be tantamount to permission to allow private action on the theory that Congress did not expressly preclude such suits.[17]

It can be argued that the "clear legislative intent" test orientation chosen by a court in such cases is a function of its already-reached decision to award or not to award a private cause of action. Thus, a court may employ a *Burke*-like analysis if it is in favor of finding an implied cause of action in a given case, but a *Chavez*-like exposition if it is about to deny such a claim. Further, it has even been disputed

> [w]hether there is such a thing as a discoverable legislative intent . . . . The controversy has centered principally over the relevance and competence of legislative history materials in ascertaining legislative intent as well as the weight which should

12. G. Folsom, Legislative History 8-12 (1972); 2A J. Sutherland, Statutes and Statutory Construction ch. 48 (C. Sands 4th rev. ed. 1973).

13. Note, The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act, 47 S. Cal. L. Rev. 383, 405 (1974).

14. J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). In Borak the Court placed great emphasis on the wording of the section of the Act which granted exclusive federal jurisdiction over Exchange Act violations. Quoting from Deckert v. Independence Shares Corp., supra, at 288, in which a substantially identical jurisdictional section of the Securities Act of 1933 was involved, the court stated: " 'The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.' " 377 U.S. at 433-34 (italics deleted). The analyses in both Deckert and Borak fail to resolve the question whether Congress intended to grant the power to bring enforcement actions to private litigants rather than solely to the Securities and Exchange Commission.

15. E.g., Amtrak, 414 U.S. 453 (1974); Calhoon v. Harvey, 379 U.S. 134 (1964); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943). But see Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958).

16. Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 894-95 (10th Cir.), cert. denied, 409 U.S. 1042 (1972).

17. Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967); Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1033 (9th Cir. 1970); Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947).

be accorded them. The Supreme Court not infrequently divides as to what is shown by or may be implied from legislative history.[18]

It may be, therefore, that application of the "clear legislative intent" test is, in many cases, either futile or sham.

An indirect application of the "intent" inquiry is found in judicial use of the rule of statutory construction *expressio unius est exclusio alterius*. By this rule, courts seek to discover Congress' view toward private remedies for statutory violations not set forth explicitly in the law by assessing the probable preclusive intent implicit in legislative enactment of other specific remedies.[19] A clear expression of the doctrine is found in *Botany Worsted Mills v. United States*,[20] where the Supreme Court stated: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[21]

In *Amtrak* and in *T.I.M.E. Inc. v. United States*,[22] the Supreme Court applied this concept in different statutory contexts. In *Amtrak*, the Court looked only to the particular section of the railway passenger act[23] in which plaintiff claimed an implied private power of enforcement.[24] That section allowed the Attorney General to seek injunctive relief against improper use of Amtrak's schedule-reduction powers in ordinary cases, and permitted private parties to seek injunctions in cases of labor agreement disputes.[25] The Court concluded that the section's grant of private enforcement power in labor cases evidenced congressional intent to foreclose private action in other situations.[26] In *T.I.M.E.*, however, the Court looked outside the section, and even outside the Act in question, to apply the *expressio unius* rule in denying a private action to recover unreasonable trucking freight charges violative of the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act).[27] Because both

18. G. Folsom, Legislative History 7-8 (1972) (footnotes omitted).

19. Amtrak, 414 U.S. 453, 458 (1974); T.I.M.E. Inc. v. United States, 359 U.S. 464, 470-71 (1959); Consolidated Freightways, Inc. v. United Truck Lines, Inc., 216 F.2d 543, 545 (9th Cir. 1954), cert. denied, 349 U.S. 905 (1955); cf. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 380-82 (1958).

20. 278 U.S. 282 (1929).

21. Id. at 289 (quoted in Amtrak, 414 U.S. at 458).

22. 359 U.S. 464 (1959). For a discussion of this case see The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 213-17 (1959).

23. Section 307(a), 45 U.S.C. § 547(a) (1970).

24. 414 U.S. at 458-65.

25. Rail Passenger Service Act of 1970 § 307(a), 45 U.S.C. § 547(a) (1970).

26. 414 U.S. at 458. Application of the expressio unius rule, however, was deemed unpersuasive in cases concerning implied federal causes of action where the purpose of the act would have been frustrated to some degree by its application. Note, Implying Civil Remedies From Federal Regulatory Statutes, 77 Harv. L. Rev. 285, 290-91 (1963) [hereinafter cited as Implying Civil Remedies]; see Wyandotte Transp. Co. v. United States, 389 U.S. 191, 198-200 (1967) (act rendering unlawful the negligent creation of obstructions in navigable waters); United States v. Republic Steel Corp., 362 U.S. 482, 487 (1960) (same); Fitzgerald v. Pan Am. World Airways, 229 F.2d 499, 500-02 (2d Cir. 1956) (act rendering unlawful the refusal of airline passage on the basis of race).

27. 359 U.S. at 472-80, construing Interstate Commerce Act, Part II, § 202(b), 49 Stat. 543 (1935), as amended, 49 U.S.C. § 302(a) (1970) (Motor Carrier Act). The Interstate Commerce Act,

the Transportation Act of 1920[28] and the Interstate Commerce Act of 1940[29] (Parts I and III of the Interstate Commerce Act) specifically allowed private recovery of unreasonable freight charges, the Court concluded that the legislature's failure to provide for a similar action under the Motor Carrier Act was intentional.[30]

Experience and reason show that successful application of the *expressio unius* rule always will result in denial of the implied remedy sought.[31] This is because the premise of the rule is that intentional action to provide express remedies imports intentional action to exclude other remedies. Whether that premise is supportable in any but the most obvious of circumstances, however, is open to serious doubt.[32]

When the "clear legislative intent" test is not dispositive, the "purpose of the act" test must be satisfied.[33] In some circumstances, this test could supersede what would seem to be clear intent to allow private action: for example, if private enforcement or private actions for damages would subvert the remedial scheme in the statute.[34] The primary inquiry under the "purpose" test is whether the allowance of an implied private cause of action would promote any of the principal objectives for which Congress enacted the statute as part of a comprehensive legislative program.[35] An evaluation of the practical consequences of allowing private enforcement is inherent in this inquiry.[36] For example, the possibility of multiple and duplicative suits against the same defendant[37] and possible interference with the functioning of governmental regulatory agencies[38] are relevant considerations.

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which created the Interstate Commerce Commission, is a regulatory rather than a penal statute. While some different considerations may apply in finding private causes of action under regulatory laws, many factors are the same. Compare Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973), with Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971).

28. Interstate Commerce Act, Part I, § 400(1)(a), 41 Stat. 474 (1920), as amended, 49 U.S.C. § 1(1)(a) (1970) (relating to rail transportation).

29. Id., Part III, §§ 303-04, 54 Stat. 931-34 (1940), as amended, 49 U.S.C. §§ 903-04 (1970) (water transportation).

30. 359 U.S. at 470-72. See also Consolidated Freightways, Inc. v. United Truck Lines, Inc., 216 F.2d 543, 545 (9th Cir. 1954), cert. denied, 349 U.S. 905 (1955); H. Black, Handbook on the Construction and Interpretation of the Laws § 72 (1911); 2A J. Sutherland, Statutes and Statutory Construction §§ 47.23-.24 (C. Sands 4th rev. ed. 1973).

31. See, e.g., note 22 supra.

32. See, e.g., discussion in Part III infra.

33. Calhoon v. Harvey, 379 U.S. 134, 140 (1964); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989, 999-1000 (D.C. Cir. 1973); Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 680 (D. Neb. 1972), aff'd, 486 F.2d 315 (8th Cir. 1973).

34. See note 26 supra.

35. Amtrak, 414 U.S. 453, 461-64 (1974); Remar v. Clayton Sec. Corp., 81 F Supp. 1014, 1017 (D. Mass. 1949).

36. See Amtrak, 414 U.S. at 461-64; Holloway v. Bristol-Myers Corp., 485 F.2d 986, 1000 (D.C. Cir. 1973).

37. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997-98 (D.C. Cir. 1973).

38. Amtrak, 414 U.S. at 461-64; Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999 (D.C. Cir. 1973); Implying Civil Remedies, supra note 26, at 296.

In *Amtrak,* the Court noted that a primary object of Congress' railroad reorganization program[39] was to permit the expeditious elimination of uneconomic train routes by the quasi-public corporation created by the Act, under the general supervision of the Interstate Commerce Commission.[40] The Court held, therefore, that to allow individual passengers to challenge route reduction plans by private actions would impede attainment of the congressional purpose.[41] On the other hand, in *J.I. Case Co. v. Borak,*[42] the Court perceived the purpose of the securities laws—to protect investors—to be of crucial importance to its finding of an implied cause of action for damages and granted an injunction against violation of the proxy solicitation statute.[43]

In the context of the "purpose of the act" test, courts determine whether Congress intended that the statute protect a specifically definable class of persons, which includes the present plaintiff, from the type of harm about which he complains.[44] For a federal statute to create a class of plaintiffs who

39. See note 10 supra and accompanying text.

40. 414 U.S. at 461.

41. Id. at 461-64.

42. 377 U.S. 426 (1964), noted in 64 Colum. L. Rev. 1336 (1964); 50 Cornell L.Q. 370 (1965); 59 Nw. U.L. Rev. 809 (1965); 1964 U. Ill. L.F. 838; 18 Vand. L. Rev. 275 (1964). The courts have had extensive experience in implying private causes of action under the federal securities laws. E.g., Drachman v. Harvey, 453 F.2d 736 (2d Cir. 1972), rev'g on rehearing en banc 453 F.2d 722 (2d Cir. 1971) (Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1970)); Bolger v. Laventhol, Krekstein, Horwath & Horwath, [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,618 (S.D.N.Y. June 27, 1974) (Investment Adviser's Act of 1940 § 206, 15 U.S.C. § 80b-6 (1970)), noted in 43 Fordham L. Rev. 493 (1974); Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949) (Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a) (1970)); 1 A. Bromberg, Securities Law: Fraud—SEC Rule 10b-5 § 2.4(1) (1973).

43. 377 U.S. at 430-33, construing Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970). "Broadly stated, the rule is that where defendant's violation of a prohibitory statute has caused injury to plaintiff the latter has a right of action if one of the purposes of the enactment was to protect individual interests like the plaintiff's." Remar v. Clayton Sec. Corp., 81 F. Supp. 1014, 1017 (D. Mass. 1949) (relying on Restatement of Torts § 286 (1934)); see note 44 infra and accompanying text.

44. Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201-02 (1967); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973); Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1034 (9th Cir. 1970). Restatement (Second) of Torts § 286 (1965) provides: "The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results." However, a statutory standard will not be found in a statute "whose purpose is found to be exclusively (a) to protect the interests of the state or any subdivision of it as such, or (b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public . . . ." Id. § 288. See also W. Prosser, Torts § 36, at 194-95 (4th ed. 1971). In an unusual case, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Supreme Court found a private cause of action for damages in favor of an individual who alleged injury from a violation of his rights under the fourth amendment of the Constitution, which protects the "class" of nearly all persons in the United States.

may be potential beneficiaries under the statute, it must directly or by clear inference grant to the prospective plaintiffs a federal right to be free from conduct which violates the statute.[45] In addition, such conduct directly must cause a cognizable harm to the prospective plaintiff.[46]

In contrast, when the statute is found to have been designed for the general welfare of the entire community—such as broad regulatory or penal statutes—some courts have refused to imply private remedies against violators.[47] Enforcement of this type of statute by private action is inappropriate for several reasons. Characteristically, violations result in intangible harm to a large segment, if not all, of society, or in such slight harm as to fall within the de minimis doctrine, or in some tangible harm which is identical in the case of all persons affected by the violation. These factors are conducive to judicial decisions that private parties lack standing to bring a suit based on the violation, that to allow private actions will result in multiplicious lawsuits wasteful of judicial resources, or that the public or common remedy expressly afforded by the statute provides the most efficient method to insure compliance with the statutory terms and objectives and to remedy injuries caused by violations.

A recent case under the federal election laws limiting individual contributions and committee expenditures,[48] *Common Cause v. Democratic National Committee,*[49] illustrates the close interrelationship between findings under the "purpose of the act" and the subsidiary "class of plaintiffs" inquiry. Here the court found that

> [a]n analysis of the legislative history of §§ 608 and 609 warrants the conclusion that voters, campaign contributors and workers, and candidates whose legitimate resources were . . . overwhelmed by large contributions to such an extent as to undermine and perhaps even nullify their right to vote were the intended beneficiaries of the statutes and comprise a class whose interests may be protected by a private civil action.[50]

45. Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 679 (D. Neb. 1972), aff'd, 486 F.2d 315 (8th Cir. 1973).

46. Id.; see Amtrak, 414 U.S. at 469 (Douglas, J., dissenting); cf. Barlow v. Collins, 397 U.S. 159, 164 (1970); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970). The issue of standing to bring an implied private action is inextricably intertwined with the initial finding of the implied action. Amtrak, 414 U.S. at 467 (Douglas, J., dissenting). Consequently, it will not be discussed in this Note as a separate issue.

47. United States v. Claflin, 97 U.S. 546, 553 (1878) (smuggling statute); see Oppenheim v. Sterling, 368 F.2d 516, 518-19 (10th Cir. 1966), cert. denied, 386 U.S. 1011 (1967) (mail fraud statute); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803, 811 (D.D.C. 1971) (dictum); cf. W. Prosser, Torts § 36, at 192-93 (4th ed. 1971).

48. 18 U.S.C. §§ 608, 609 (1970). Sections 608 and 609 have since been amended and repealed, respectively. Federal Elections Campaign Act of 1971, Pub. L. No. 92-225, §§ 203, 204, 86 Stat. 9, 10, repealing and amending 18 U.S.C. §§ 608 & 609 (1970) (codified at 18 U.S.C. § 608 (Supp. II, 1972)). See also note 120 infra.

49. 333 F. Supp. 803 (D.D.C. 1971).

50. Id. at 812. The political contribution sections of the election laws may be viewed, however, as broadly regulatory and penal, and thus intended to benefit the general public rather than to grant to private individuals the right to be free from the prohibited conduct. See Ash v. Cort, 496 F.2d 416, 428-29 (3d Cir. 1974) (Aldisert, J., dissenting), cert. granted, 43 U.S.L.W.

Thus, since the purpose of these sections was to safeguard the rights of certain persons, the court concluded that it would be appropriate to accord an implied power of injunctive relief to those who comprised the protected class. Moreover, in *Borak,* the Supreme Court used a "class of plaintiffs" analysis in authorizing the institution of a shareholder derivative action as the proper device by which to pursue the implied damages action which it found in the securities laws. Reasoning that the shareholders of the target company in a merger were vindicating the rights of their company rather than recovering for personal losses due to violation of the federal proxy solicitation statute, the Court concluded that "[t]o hold that derivative actions are not within the sweep of the section would . . . be tantamount to a denial of private relief."[51]

In some cases where courts have discussed the third test—adequacy of the statutorily designated method of enforcement—the inability or unwillingness of the person charged with executing the law to bring enforcement actions has been found persuasive in permitting injured parties to bring private suits.[52] In *Common Cause,* for example, the court concluded from the apparent absence of criminal enforcement of sections 608 and 609 of the election laws that the Justice Department had been unable to enforce either section and that private enforcement power would help to insure compliance with the statutory program.[53] Similarly, in *Borak,* the Court accepted the contention of the Securities and Exchange Commission, as amicus curiae, that an implied damages action under the proxy section of the securities laws was a necessary supplement to the SEC's supervisory and enforcement role due to the limited staff and resources of the Commission.[54]

While the policy consideration which leads to inquiry into the record of enforcement of the statute is apparent, the test is of dubious propriety.[55] The degree to which a federal statute is enforced is a product both of congressional judgment of the importance of pursuing violators (as reflected by the funds appropriated to the relevant agency for that purpose) and of prosecutorial discretion. It would seem, therefore, that by considering lack of enforcement of the statute as a factor favoring implied private causes of action, courts encroach on the provinces of the legislative and executive branches. Thus far, at least, inadequate enforcement has not been held sufficient, by itself, to overcome a contrary conclusion drawn on the basis of the first two tests.[56]

3279 (U.S. Nov. 11, 1974) (No. 73-1908). In this connection, it is important to note that plaintiffs in Common Cause did not seek individual damages, as did plaintiff in Ash, but rather sought injunctive enforcement to prevent injury to the elective process.

51. 377 U.S. at 432.

52. Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967) (dictum).

53. 333 F. Supp. at 813. Apparently, no prosecution had ever been brought under § 608 or § 609. Brief of Appellees at 21, Ash v. Cort, 496 F.2d 416 (3d Cir. 1974), cert. granted, 43 U.S.L.W. 3279 (U.S. Nov. 11, 1974) (No. 73-1908) [hereinafter cited as Brief of Appellees]. Another possible remedy would have been for plaintiffs to petition Congress to appropriate additional funds for the enforcement of the law.

54. 377 U.S. at 432-33.

55. See note 100 infra.

56. See Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973); Chavez v.

In implied private damages cases, courts have considered, as a fourth test, the effectiveness of existing state remedies as an alternative to finding an implied federal remedy.[57] When courts conclude that a federal statute has created a federal right to be administered in federal court, a federal remedy will be found notwithstanding the presence of state remedies which would serve essentially the same purpose.[58] On the other hand, when no compelling federal interest is involved, courts have treated the availability of a private state remedy as a factor militating against claimed implied federal suits.[59]

To the extent that judicial creation of federal remedies in cases where adequate state remedies exist constitutes a determination that Congress impliedly considered the coexisting state remedy to be insufficient, this test should be employed sparingly. One court has counselled wisely that

> [j]udicial implication of ancillary Federal remedies is a matter to be treated with care, lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently.[60]

In *Borak,* the Supreme Court found an implied shareholder derivative action under the federal securities laws despite the existence of alternative state remedies.[61] This decision has been criticized as tantamount to a supplantation of state law without a clear legislative expression of intent to achieve that end:

> The significance of [Borak] lies in the Court's assertion that overriding federal law

Freshpict Foods, Inc., 456 F.2d 890, 893 (10th Cir.), cert. denied, 409 U.S. 1042 (1972); Civil Responsibility, supra note 4, at 1343-44.

57. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 394 (1971); see Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973). As a question of policy, consideration of alternative means of redress other than state actions may be appropriate in some cases. Id.; Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 679 (D. Neb. 1972), aff'd, 486 F.2d 315 (8th Cir. 1973).

58. J.I. Case Co. v. Borak, 377 U.S. 426, 432, 434-35 (1964); 50 Cornell L.Q. 370, 371-72 (1965). "[T]he overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law, for it 'is not uncommon for federal courts to fashion federal law where federal rights are concerned.' . . .

". . . Furthermore, the hurdles that the victim might face [in state actions] (such as separate suits, . . . security for expenses statutes, bringing in all parties necessary for complete relief, etc.) might well prove insuperable to effective relief." 377 U.S. at 434-35 (citations omitted).

59. Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir.), cert. denied, 409 U.S. 1042 (1972); Implying Civil Remedies, supra note 26, at 292-93; see McCord v. Dixie Aviation Corp., 450 F.2d 1129, 1130 (10th Cir. 1971); Consolidated Freightways, Inc. v. United Truck Lines, Inc., 216 F.2d 543, 544, 546 (9th Cir. 1954), cert. denied, 349 U.S. 905 (1955).

60. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973).

61. See 377 U.S. at 434-35. By creating a federal remedy not expressly provided by Congress and by removing an impediment to shareholder derivative suits, Borak represents an incursion by the federal courts into an area which had been regulated primarily, if not exclusively, by the states. Implication of a federal cause of action freed the plaintiff-investors in Borak from certain of the anti-strike suit prerequisites to state derivative suits. However, derivative suits brought in federal court remain subject to the "contemporaneous ownership" requirement—that plaintiff owned stock in the corporation both at the time of the alleged injury and at the time of the action. Fed. R. Civ. P. 23.1.

controls the appropriateness of redress despite the provisions of state corporation law; the interpretation of this statement may determine the development of federal rules of liability for corporate misconduct in an area of the law heretofore reserved to the states. In view of the absence of congressional purpose to displace established corporation law, it is important that the broadly worded decision of the Court be restricted to its proper sphere—the effective enforcement of [the proxy section].[62]

This reasoning is applicable whenever courts ignore available alternative recourses of a plaintiff—whether to state judicial or federal administrative remedies—in implying a federal private cause of action.[63]

The four tests discussed above must be viewed with the caveat that they are clearly interrelated and contain overlapping considerations. It is difficult in concrete cases, for example, to distinguish a court's legislative intent analysis from its "purpose of the act" criterion. Soo too, the "purpose of the act" and "class of plaintiffs" inquiries share many similar aspects.[64] For analytical purposes, however, it is possible to identify areas of judicial concern in cases presenting the question of implied private remedies. Among these four tests, "record of enforcement" and "state remedies" are decidedly less important than "clear legislative intent" and "purpose of the act." In some cases, the former two tests seem to have been used only to further justify a result otherwise supportable and already reached.[65] The fact that they are applied, however, indicates that they represent additional areas of judicial interest.[66]

III. A RECENT EXAMPLE: *Ash v. Cort*

The Supreme Court recently granted certiorari in *Ash v. Cort,*[67] a case arising under section 610 of the federal election laws.[68] That section imposes criminal penalties upon corporations for making partisan political contributions to candidates or political parties for the purpose of influencing federal elections.

In *Ash,* a stockholder of Bethlehem Steel Corporation who was registered

62. 64 Colum. L. Rev. 1336, 1338 (1964).

63. See Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999-1001 (D.C. Cir. 1973).

64. See note 46 supra.

65. See, e.g., Amtrak, 414 U.S. 453, 464 (1974).

66. See notes 52-63 supra and accompanying text.

67. 496 F.2d 416 (3d Cir. 1974), cert. granted, 43 U.S.L.W. 3279 (U.S. Nov. 11, 1974) (No. 73-1908).

68. 18 U.S.C. § 610 (Supp. II, 1972), amending 18 U.S.C. § 610 (1970). "It is unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . .

"Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both." Id.

to vote in federal elections brought a shareholder derivative suit in federal court seeking damages from and an injunction against Bethlehem directors.[69] He alleged that the directors illegally had expended general corporate funds to publish a partisan political advertisement consisting of partial reprints of a speech by the chairman of the Bethlehem board of directors. The district court refused plaintiff's application for a preliminary injunction and granted defendants' motion to dismiss the claim for a permanent injunction on the ground that section 610 does not authorize private remedies. In addition, the court ordered plaintiff to post security for defendants' expenses in relation to his pendant state claim that the political expenditure was actionable corporate waste. Plaintiff amended his complaint to eliminate the pendant claim and substituted a count for damages under section 610, urging the court to recognize an implied private cause of action to return the illegally spent moneys to the corporate treasury. The district court granted defendants' motion for summary judgment on the grounds that plaintiff had no right of action under section 610 and that, in any event, defendants' acts did not violate the section.[70] The Court of Appeals reversed, finding an implied private damages action under the section and holding that plaintiff had standing to bring such an action.[71]

No direct precedent existed for the Third Circuit's decision in *Ash v. Cort* to find an implied cause of action for damages in section 610 of the federal election laws. *Common Cause,*[72] which involved sections 608 and 609, is distinguishable on the ground that plaintiffs there sought only private injunctive enforcement rather than money damages.[73]

Several federal district courts and state tribunals have allowed derivative actions by shareholders or direct suits by corporations to recover corporate funds contributed to political causes in violation of state statutes analogous to the federal law. In none of the opinions is it clear, however, how the court arrived at its decision, or whether it was creating an implied statutory cause of action rather than extending an existing form of action.[74]

69. At all times relevant to the case, plaintiff owned fifty shares of Bethlehem Steel Corporation common stock. Ash v. Cort, 350 F. Supp. 227, 229 (E.D. Pa. 1972), aff'd per curiam, 471 F.2d 811 (3d Cir. 1973) (proceedings on application for preliminary injunction).

70. Ash v. Cort, Civil No. 72-1925 (E.D. Pa., July 11, 1973), rev'd, 496 F 2d 416 (3d Cir. 1974), cert. granted, 43 U.S.L.W. 3279 (U.S. Nov. 11, 1974) (No. 73-1908).

71. 496 F.2d 416, 421-24 (3d Cir. 1974) (per Seitz, J.), cert. granted, 43 U.S.L.W. 3279 (U.S. Nov. 11, 1974) (No. 73-1908). The court also found the alleged political bias of Bethlehem's statements to be a disputed factual issue and held, therefore, that summary judgment was inappropriate. Id. at 425-26.

72. 333 F. Supp. 803 (D.D.C. 1971).

73. Id. at 806.

74. In Schwartz v. Romnes, 357 F. Supp. 30 (S.D.N.Y. 1973), rev'd on other grounds, 495 F.2d 844 (2d Cir. 1974), district court opinion noted in 5 St. Mary's L.J. 848 (1974), the district court ruled that a shareholder could maintain a derivative action to sue a corporation for a contribution in violation of New York's equivalent of § 610. 357 F. Supp. at 37-38. It is not clear from the opinion whether the court was implying a private cause of action under the statute or allowing a cause of action under the doctrine prohibiting ultra vires corporate acts (see notes 107-09 infra and accompanying text), or both. See 357 F. Supp. at 37-38. But see 5 St. Mary's

In *Ash v. Cort,* the Third Circuit mentioned, but did not apply, the "clear legislative intent" test.[75] Since the legislative history of section 610 is devoid of reference to private civil remedies,[76] its application would have yielded no affirmative result.[77] Unlike those courts which have construed congressional silence alternately as a de facto legislative pronouncement in favor of or against implied private civil action,[78] however, the *Ash* court accorded the silence no weight at all.[79]

In all implied cause of action cases, the ultimate issue for the court is whether a private remedy for statutory violations is compatible with the express provisions written into the statute by Congress.[80] The primary question, which is embodied in the "clear legislative intent" test, is whether Congress desired private actions—directly for enforcement or indirectly for damages—to serve as an adjunct to the express remedies set forth. Measured against this standard, the *Ash* court could reach no conclusion, since it appears to have recognized correctly that there was no evidence Congress had ever considered this issue in connection with section 610.[81]

Ash turned, therefore, to the "purpose of the act" test and the related "class of plaintiffs" inquiry.[82] The majority found in the predecessor to section 610, the Corrupt Practices Act, a legislative desire to destroy corporate financial influence over elections and to prevent corporate officials from using corporate funds for political purposes without shareholder approval.[83] Plaintiff was

L.J. 848 (1974). In Capital Elec. Power Ass'n v. Phillips, 240 So. 2d 133 (Miss. 1970), the court upheld without discussion a cross-complaint by a corporation against its former general manager for return of corporate funds illegally donated as a political contribution. See generally Civil Responsibility, supra note 4, at 1340. One district court case denied a cause of action in the analogous situation of union members seeking reimbursement of the union treasury for funds spent by union officials in violation of § 610. Relying on the district court opinion in Ash, the court ruled that § 610 did not authorize private action and suggested that the plaintiffs seek institution of a criminal prosecution. McNamara v. Johnston, 360 F. Supp. 517, 525-27 & n.20 (N.D. Ill. 1973). But see note 100 infra.

75. 496 F.2d at 421 & n.3. The court stated: "Certainly, legislative intent is relevant; where the legislature clearly has indicated its intent to grant or withhold a cause of action, implicitly or explicitly, courts will give effect to that intent. . . . Absent some reasonably clear indication of legislative attention . . . however, courts ascertain the policies underlying the substantive law and determine the propriety, as a means of effectuating those policies, of affording litigants a particular remedy." Id. at 421 (citation omitted).

76. Id. at 428 (Aldisert, J., dissenting). Providing criminal penalties and publicizing contributions through reporting were considered by Congress as the proper methods for dealing with corporate campaign contributions. See 65 Cong. Rec. 9507 (1924) (remarks of Senator Borah).

77. 496 F.2d at 421.

78. See notes 3-6 supra and accompanying text.

79. 496 F.2d at 421-22.

80. This assumes that the court in Ash was creating an implied statutory cause of action and not a common law action for corporate waste based on the inherent power of the judiciary to create remedies. Cf. Erie R.R. v. Tompkins, 304 U.S. 64, 65 (1938).

81. 496 F.2d at 421 (by implication); id. at 427 (Aldisert, J., dissenting); Brief of Appellees at 7.

82. 496 F.2d at 422; see note 33 supra.

83. 496 F.2d at 422; see United States v. UAW-CIO, 352 U.S. 567, 570-75 (1957); 117 Cong.

found to be a member of the class to be protected since, as a voter, he clearly fell within section 610's purpose of protecting voters from dilution of their franchise.[84] Furthermore, the plaintiff as stockholder also fell within the statutory protection intended by section 610, since 610 had as a second purpose the protection of shareholders from illegal expenditures of corporate funds. Thus, the court reasoned that return of those funds to the corporate treasury by means of a derivative action, a mechanism already approved by the Supreme Court in *Borak*,[85] was appropriate to advance the purpose of the Act.[86] Although the court recognized that "the breadth of § 610's coverage favors enforcement solely by criminal sanction to avoid a multiplicity of possible suits challenging intangible public harm,"[87] it also noted that "[t]his objection pertains to suits by non-stockholder citizens."[88] Emphasizing that plaintiff Ash was both a voter and a stockholder,[89] the court cured its objection by narrowly limiting the class of plaintiffs who could bring private actions to those occupying the dual voter-shareholder status.[90]

To support its conclusion that private enforcement would further the purpose of section 610, the court also noted that violations of that section most likely would occur immediately before elections.[91] It suggested, therefore, that enforcement by civil actions would be more responsive[92] and effective in implementing the Act than post facto enforcement by criminal proceedings.[93] The court made clear that its decision rested principally on the "purpose of the act" test and the related "class of plaintiffs" inquiry.[94]

Rec. 43,381 (1971) (remarks of Rep. Hansen); 41 Cong. Rec. 22 (1906) (annual message of President Theo. Roosevelt); 40 Cong. Rec. 96 (1905) (annual message of President Theo. Roosevelt); Comment, Corporate Political Affairs Programs, 70 Yale L.J. 821, 836 (1961) [hereinafter cited as Corporate Political Affairs].

84. 496 F.2d at 422; cf. Allen v. State Bd. of Elections, 393 U.S. 544, 554-56 (1969); Baker v. Carr, 369 U.S. 186, 206 (1962); Nader v. Kleindienst, 375 F. Supp. 1138, 1140 (D.D.C. 1973), aff'd on other grounds sub nom. Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803, 812-13 (D.D.C. 1971).

85. See text accompanying note 61 supra.

86. 496 F.2d at 423-24. "As a stockholder, plaintiff is within the class secondarily protected by § 610, which keeps control over political contributions in his hands and not in those of corporate managers or directors." Id. at 422.

87. Id. at 423.

88. Id. at 423 n.6.

89. Id.

90. Id. The court's treatment of this issue implies that if plaintiff had been a voter only, an implied cause of action would not have been found because of the evident danger that unlimited suits would hinder attainment of a congressional purpose. See id. at 422-23. See also Amtrak, 414 U.S. 453, 463 (1974); notes 36-38 supra and accompanying text. This again implicates the nexus between standing to bring an implied cause of action and the creation of that action. See note 46 supra.

91. 496 F.2d at 423-24.

92. While a civil action for an injunction could be relatively swift, see id. at 424, a private damages action would probably last an extended period of time.

93. Id. at 423-24.

94. Id. at 421. The court's "class of plaintiffs" analysis is accurate, provided that its findings

The first purpose of the Corrupt Practices Act, to which the *Ash* court looked in reaching its decision, was to eliminate the influence over elections which corporations had exercised through financial contributions.[95] Inasmuch as the 1972 election—during which the defendants allegedly violated the Act[96]—was completed and any influence over elected candidates that might result from campaign contributions was an accomplished fact, any recovery by the corporation could not advance the preventive goal of this purpose of the Act. With respect to future elections, however, the prospect of forced repayment to the corporate treasury by the director-defendants could serve a deterrent effect, especially since that remedy would be implemented, in theory, by thousands of corporate voter-shareholders. Yet, in setting out criminal sanctions in the form of fines and imprisonment, Congress had built a deterrent into section 610. Thus, in the context of the first goal of the Act, the *Ash* decision creates a liability which is, in some ways, duplicative of that provided for by Congress. Query whether it is the province of the judiciary, under the guise of statutory construction, to determine that the remedial and prophylactic measures enacted by the legislature are insufficient.[97]

While the court also found within the Corrupt Practices Act a purpose of preventing corporate officials from donating corporate funds to political parties without shareholder approval, evidence to support this view is scant.[98] It can be said that simply by outlawing *all* corporate political contributions Congress acted to fulfill this goal, since under section 610 no corporate moneys legally may be used, with or without shareholder approval, for political purposes. Nevertheless, if the allegations of the plaintiff are true,[99] unscrupulous directors may still be draining corporate treasuries illegally. Thus, the question is whether the second purpose of the Act is sufficient to support the proposition that section 610 should be construed to provide a federal right remediable by a federal private cause of action for damages because shareholder-voters are peculiarly injured by violation of its provisions.

The court also discussed the prior history of enforcement of section 610,[100]

as to the "purpose of the act" test are a valid base from which to construct an implied cause of action which would be available to some group of potential plaintiffs.

95. See note 83 supra and accompanying text.

96. 496 F.2d at 418.

97. See note 110 infra.

98. In support of its finding of the second purpose of § 610, the Supreme Court, in United States v. CIO, 335 U.S. 106 (1948), cited only one page of legislative hearings and one page of congressional debate. Id. at 113, citing Hearings before the House Comm. on the Election of the President, 59th Cong., 1st Sess. 76 (1906); 40 Cong. Rec. 96 (1905). No other support for the point has been found in the legislative history of the Act.

99. 496 F.2d at 418.

100. Id. at 423; see notes 52-56 supra and accompanying text. While the Justice Department has enforced § 610, it has been suggested that many violators are not prosecuted. Farr, Political Contributions by Corporations in Federal Elections, 19 Bus. Law. 789, 790 (1964); Lambert, Corporate Political Spending and Campaign Finance, in 1966-1967 Corporate Practice Commentator 343, 351; Civil Responsibility 1328 & n.7; see Wall St. J., Nov. 4, 1974, at 14, col. 1. A writ of mandamus to compel government enforcement of § 610 will not necessarily result in enforcement. See Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974).

the third test for implying a private right of action, and suggested that government enforcement may be insufficient and that public officials elected with the help of corporate donations may not promote prosecutions of donating companies for violations of the section.[101] The court implied that it would be appropriate to allow individual plaintiffs to act as private attorneys general in enforcing section 610.[102] However, whether the act has been enforced effectively is not an issue meet for judicial consideration.[103] Moreover, unlike the apparent situation in *Common Cause,*[104] the Justice Department has attempted to enforce the prohibitions of section 610.[105] *Ash* offered no factual evidence that would justify its theory that elected officials who have received corporate donations will suppress, or have the power to suppress, prosecutions by the Justice Department. Finally, unlike *Borak,* there was no urging by the Justice Department by way of an amicus curiae brief, that a private right of action was necessary or that the Justice Department was unable to handle adequately the situations in which the Act was violated.[106]

The *Ash* court did not consider the alternative remedies available to the plaintiff under state law. It in substance used a federal election law to effect a remedy for what is essentially misuse of corporate funds by directors. Arguably, since section 610 provides only criminal sanctions, Congress impliedly left protection of the corporate fisc to traditional state actions for corporate mismanagement and/or commission of ultra vires acts.[107] While *Borak* sanc-

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101. 496 F.2d at 423-24.

102. Id. at 423. The Ash court did not deal with defendants' contentions that to allow a private cause of action would lead to frivolous suits and an increase in the judicial workload. Brief of Appellees at 20. Defendants' final argument against the implied private cause of action was that § 610 is of doubtful constitutionality under the first amendment and that, therefore, its coverage should not be expanded by judicial construction. Id. at 20-21. The court believed its construction of the statute obviated the necessity of reaching the constitutional contentions and noted that the issue could be reasserted on remand. 496 F.2d at 426. The first amendment issue is, however, beyond the scope of this Note.

103. See note 55 supra and accompanying text. The Ash court denominated the enforcement test as a "collateral" consideration. 496 F.2d at 423.

104. See note 53 supra.

105. See materials discussed in note 100 supra.

106. 377 U.S. at 427, 432.

107. In this area of the law, it is useful to employ a broad, functional definition of "ultra vires" to denote "corporate activity which, if challenged in a derivative lawsuit, will result in liability for those instigating the activity." Civil Responsibility 1327 n.1, 1328-40. Commentators disagree on whether an ultra vires cause of action can be maintained for illegal political contributions. Compare Garrett, Corporate Contributions for Political Purposes, 14 Bus. Law. 365, 367 (1959), with Corporate Political Affairs, supra note 83, at 850-51. It appears from the weight of authority that such an action is possible. Blumberg, Corporate Responsibility and the Social Crisis, 50 B.U.L. Rev. 157, 189 n.197 (1970); Civil Responsibility 1329; Corporate Political Affairs 850-56. But see Garrett, supra, at 367. Some older cases dealt with the issue of whether or not corporate political contributions are ultra vires expenditures of corporate funds. Mobile Gas Co. v. Patterson, 293 F. 208 (M.D. Ala. 1923) (political contributions not proper business expense); McConnell v. Combination Mining & Milling Co., 31 Mont. 563, 79 P. 248 (1905) (directors chargeable for contribution to political movement unless authorized by shareholders);

tioned a federal remedy which regulated some aspects of internal corporate affairs,[108] perhaps the rationale of a case arising under the securities laws should not be readily applied to a federal election law which arguably was not intended to intrude so forcefully into the same area.[109]

In his dissent, Judge Aldisert asserted that a cause of action should not be implied without first finding at least some relevant indication of congressional intent favoring private enforcement.[110] He noted that Congress recently had reviewed the election laws but had not inserted any provision for private action in section 610.[111] In his view, this failure to act affirmatively to include a private right of action should have been construed as an affirmative decision

People ex rel. Perkins v. Moss, 187 N.Y. 410, 80 N.E. 383 (1907) (corporation's acts in making political contribution were ultra vires).

The complaint originally filed in Ash charged that the corporate expenditure was ultra vires and illegal under the law of Delaware, the state of Bethlehem Steel's incorporation. Petitioner's Brief for Certiorari at 9, Ash v. Cort, 42 U.S.L.W. 3703 (U.S. June 20, 1974) (No. 73-1908). When ordered by the court to post security for defendants' expenses as a condition to maintaining the state cause of action (pursuant to Pa. Stat. Ann. tit. 15, § 433 (1967)), plaintiff amended his complaint to eliminate the pendant state claim, Petitioner's Brief for Certiorari at 11, and to seek damages as well as an injunction under the federal election statute. 496 F.2d at 419. In a very recent decision, the Third Circuit held that § 610, the statute involved in Ash, supplies a standard for directors' liability in state actions for corporate waste. Miller v. American Tel. & Tel. Co., Civil No. 73-2007 (3d Cir., Nov. 4, 1974) (per Seitz, J.). The court concluded that since payments in violation of § 610 are illegal, they are ipso facto ultra vires, and that if plaintiffs could prove the elements of a § 610 violation, the directors of the defendant corporation would be liable to the corporation for the amount of the political contribution.

108. 377 U.S. at 431-32, 433. The Court in Borak also drew support from Congress' grant of exclusive jurisdiction to the federal courts for enforcement of the Act. Id. at 431. The election laws contain no such jurisdictional provision.

109. It has been suggested that another consideration would be the pendency in Congress of measures to reform the area of law. See Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 893-95 (10th Cir.), cert. denied, 409 U.S. 1042 (1972). In fact, Congress is considering a number of comprehensive campaign reform measures at the present time. E.g., S. 2943, 93d Cong., 2d Sess. (1974); H.R. 16,011, 93d Cong., 2d Sess. (1974). See note 120 infra.

110. 496 F.2d at 427 (Aldisert, J., dissenting). Moreover, Judge Aldisert pointed out that the majority's willingness to find a private cause of action without any evidence of congressional intent could lead, at its logical extreme, to the untenable conclusion that Congress impliedly had enacted a companion civil code to the entire federal criminal code. Id. at 429. He maintained that to by-pass the "clear legislative intent" test would violate the constitutional doctrine of separation of powers and would constitute judicial legislation. Id. at 426-28. The dispute between the majority and the dissent in Ash concerning the necessity of finding clear congressional approval for implied civil causes of action under § 610 centered on a fundamental disagreement as to the proper limits of judicial power in construing legislation. It has been argued persuasively that the doctrine of separation of powers requires that the judiciary avoid finding implied private remedies absent some express indication of congressional intent in favor thereof. Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir.), cert. denied, 409 U.S. 1042 (1972); see Forkosch, The Separation of Powers, 41 U. Colo. L. Rev. 529, 535 (1969). See generally A. Bickel, The Least Dangerous Branch 46-47 (1962); 1 Sutherland, supra note 12, at § 3.06. Courts are not equipped to carry out the extensive investigations that may be necessary to assess the full impact of a change in federal statutory law. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 427-30 (1971) (Black, J., dissenting).

111. 496 F.2d at 427 (Aldisert, J., dissenting); see notes 109 supra & 120 infra.

to exclude such a remedy.[112] Moreover, applying the *expressio unius* rule to the total scheme of political contributions legislation, the dissent stated that *T.I.M.E.* was controlling.[113] He pointed out that Congress had amended section 610 in Title II of the Federal Election Campaign Act of 1971.[114] Title III of that Act imposed, for the first time, certain reporting and disclosure requirements on candidates and campaign committees,[115] and expressly provided for both civil actions by the Attorney General and criminal sanctions to curb violations of Title III provisions.[116] On this basis, Judge Aldisert argued that the express provision for civil enforcement in Title III was tantamount to an intentional exclusion in section 610 as amended by Title II.[117] The majority refused to draw this inference.[118] The *expressio unius* rule thus applied by the dissent does not yield persuasive results. That rule requires a basic similarity between the two provisions under comparison; otherwise, the expression in one cannot logically be said to imply exclusion in the other. This basic similarity does not exist between Titles II and III of the 1971 law.[119]

It seems, therefore, that the impact of *Ash* lies in the fact that the court used an election law, containing express penal sanctions against financial contributions that disturb the democratic electoral process, as a device to extend federal jurisdiction over internal corporate acts and to grant shareholders a federal right of action against the directors of their company. This decision is grounded in what is, at best, a secondary purpose of the Corrupt Practices Act. When a federal act aims broadly to cure a variety of evils, there is no objection to basing a private implied cause of action in a second purpose of the statute. Yet, the alleged second purpose of the Corrupt Practices Act is supported by little congressional history and less reason.

IV. CONCLUSION

Undoubtedly, it is important that federal courts develop and implement remedies for violations of federal statutory rights when the legislature—either

112. 496 F.2d at 428 (Aldisert, J., dissenting); see note 16 supra and accompanying text.

113. 496 F.2d at 427-28 (Aldisert, J., dissenting).

114. Act. of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, 86 Stat. 11, amending 18 U.S.C. §§ 591, 600, 608, 610, 611 (1970) and repealing 18 U.S.C. § 609 (1970) (codified as 18 U.S.C. §§ 591, 600, 608, 610, 611 (Supp. II, 1972)).

115. 2 U.S.C. § 434 (Supp. II, 1972).

116. Id. §§ 438(d)(1)-(5), 441.

117. 496 F.2d at 427-28 (Aldisert, J., dissenting).

118. Id. at 421-22 n.4.

119. The different remedy provisions of the three Parts of the Interstate Commerce Act at issue in T.I.M.E. were set forth in parallel regulatory schemes which were intended to control similar problems in different areas of the shipping industry. See notes 27-30 supra and accompanying text. By contrast, Title III of the 1971 Election Act was neither aimed at the same problems nor sufficiently parallel in structure to Title II to apply the expressio unius rule to the type of enforcement selected by Congress in § 610. Similarly, Amtrak is not valid authority for application of the expressio unius rule in Ash. In Amtrak, the express provision for private enforcement only in cases involving labor agreements demonstrated clearly that Congress had considered the issue of private enforcement. See notes 20-21, 23-26 supra and accompanying text. By contrast, the fact that Congress provided for only penal enforcement of § 610 does not indicate anything similar about legislative attitude toward private enforcement.

by express wording or by clear intendment—so directs. Yet, it is equally important that courts refrain from expanding statutory liabilities and penalties with no more support than that the judicially discovered "purpose" of the act would, in the court's view, be "furthered." To a large degree, that is what the Third Circuit has done in *Ash v. Cort* and what the federal courts will continue to do unless the Supreme Court restricts such judicial "construction."[120]

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120. The following addition should be noted with respect to the federal election laws. Congress recently passed the Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263. This Act, which will generally become effective on January 1, 1975, id. § 410(a), among other things increases the fines for violation of § 610, id. § 101(e)(1)(A), (B), and established a Federal Election Commission to obtain compliance with, and to formulate policy with respect to § 610 and other sections of the election laws. Id. § 208(a). The Commission must entertain complaints registered by any person concerning violations of § 610 and other sections, and has the power to conduct investigations into alleged violations as well as to bring civil actions in federal district court to restrain or enjoin violations found to exist after investigation. Id. Neither the Act nor the legislative history thereof (S. Rep. No. 93-689, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. (1974); S. Conf. Rep. No. 93-1237, 93d Cong., 2d Sess. (1974); H.R. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. (1974)) contains any discussion of implied private damages or enforcement actions.